Supreme Court of the United States

October Term, 1947

No. 350

WILLIAM DUDLEY PELLEY,
Petitioner,

v.

W. BRUCE MATTHEWS, UNITED STATES MARSHAL,
Respondent.

PETITION FOR REHEARING

We rely, for the purpose of this petition, upon the case of *Sunal v. Large*, 91 L. Ed. 1561, 1562, 1563—being cases numbered 535 and 840, combined, and decided by this Court June 23, 1947.

This language of the Court appears to make our case.

> "The First Judiciary Act empowered the courts of the United States to issue writs of habeas corpus. Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81, c. 20. Since the scope of the writ was not defined by Congress, it carried its common law implications. The writ was greatly enlarged after the Civil War by the Act of February 5, 1867. 14 Stat. 385, c. 27. (For legislation dealing with habeas corpus see note in 18 F. 68.) It was no longer limited to searching the face of a judgment of a court of competent jurisdiction. It was available to cut through forms and go

'to the very tissue of the structure,' Mr. Justice Holmes in Frank v. Mangum, 237 U. S. 309, 345, 346, 59 L. ed. 969, 986, 987, 35 S. Ct. 582, though it was certainly not to be invoked merely as a substitute for an available appeal. But what is 'form' and what is the 'tissue of the structure,' and when is a writ sought in fact as a substitute for an appeal in a practical view of the administration of justice, are questions to which our decisions give dubious and confused answers. I think it is fair to say that the scope of habeas corpus in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received.

"The extent to which this Court has left itself unhampered, by not drawing sharp jurisdictional lines, is indicated by the following very tentative classification of categories in which habeas corpus has not been deemed beyond the power of federal courts to entertain:

"(1) Conviction by a federal court which had no jurisdiction either over the person or of the offense. See Ex parte Watkins, 3 Pet. (U. S.) 193, 203, 7 L. ed. 650, 653; Ex parte Parks, 93 U. S. 18, 23, 23 L. ed. 787, 788. But the writ is discretionary and may not issue even though if an opportunity were allowed such want of jurisdiction might be established. See Toy Toy v. Hopkins, 212 U. S. 542, 53 L. ed. 644, 29 S. Ct. 416, and Rodman v. Pothier, 264 U. S. 399, 68 L. ed. 759, 44 S. Ct. 360. And compare Re Mayfield, 141 U. S. 107, 35 L. ed. 635, 11 S. Ct. 939, with Re Blackbird (C. C.) 66 F. 541.

"(2) Conviction under unconstitutional statute. Ex parte Virginia 100 U. S. 339, 343, 25 L. ed. 676, 678; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Ex parte Curtis, 106 U. S. 371, 27 L. ed. 232, 1 S. Ct. 381; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 S. Ct. 152. The writ was denied in each case, but the Court passed on the constitutionality of the statute. Here to the availability of the writ will depend on the circumstances of the case, particularly the stage in the criminal proceedings at which the writ is sought. Johnson v. Hoy, 227 U. S. 245, 57 L. ed. 497, 33 S. Ct.

240; Henry v. Henkel, 235 U. S. 219, 59 L. ed. 203, 35 S. Ct. 54. Compare Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 S. Ct. 753, with Re Gregory, 219 U. S. 210, 55 L. ed. 184, 31 S. Ct. 143. See also Re Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 S. Ct. 602.

"(3) Violation by federal courts of specific constitutional rights: (a) double jeopardy. Compare Ex parte Bigelow, 113 U. S. 328, 28 L. ed. 1005, 5 S. Ct. 542, with Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 S. Ct. 556, and Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 S. Ct. 672; (b) self-crimination. Writ granted as to a witness held in contempt, though apparently not as to a defendant restrained on charge of crime. Compare Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 12 S. Ct. 195, 3 Inters. Com. 816, and Ex parte Irvine (C. C.) 74 F. 954 (Taft, Circuit Judge), with Re Moran, 203 U. S. 96, 51 L. ed. 105, 27 S. Ct. 25; (c) no indictment by grand jury. Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 S. Ct. 935. Also Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 S. Ct. 781. As to denial of constitutional rights in State courts, Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265.

"(4) Due regard for harmonious Nation-State relations, need to avoid friction and maintain balance. See Ex parte Rowland, 104 U. S. 604, 26 L. ed. 861; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 S. Ct. 482; Bowen v. Johnston, 306 U. S. 19, 83 L. ed. 455, 59 S. Ct. 442. Compare Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 S. Ct. 785; Re Swan, 150 U. S. 637, 37 L. ed. 1207, 14 S. Ct. 225; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L. R. A. N. S. 932, 14 Ann. Cas. 764. Availability of other remedies is here an important factor. Similarly as to State interference with federal officers, prompt relief may be deemed necessary. Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453. See also Re Neagle (Cunningham v. Neagle), 135 U. S. 1, 34 L. ed. 55, 10 S. Ct. 658; Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747, 28 S. Ct. 472.

"(5) Insufficiency of indictments is not open on habeas corpus; it may be in removal cases, in view

of the hardship to the individual and the inadequacy of other remedies. Compare Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. Ct. 430; also Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 S. Ct. 760. Compare also the extradition cases. Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 S. Ct. 1240; Ornelas v. Ruiz, 161 U. S. 502, 40 L. ed. 787; 16 S. Ct. 689; Bryant v. United States, 167 U. S. 104, 42 L. ed. 94, 17 S. Ct. 744.

"(6) Defects in jury panel, in trial procedure, exclusion or insufficiency of evidence, are rarely held ground for relief on habeas corpus. But when no other remedy was available and the error appeared flagrant, there have been instances of relief. See Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. Ct. 430. Compare Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 S. Ct. 781.

"(7) Legality of sentence or conditions of confinement. Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872; Re Bonner, 151 U. S. 242, 38 L. ed. 149, 14 S. Ct. 323.

"(8) Contempt cases. Ex parte Hudgings, 249 U. S. 378, 384, 63 L. ed. 656, 39 S. Ct. 337, 11 A. L. R. 333. Compare, Re Savin, 131 U. S. 267, 33 L. ed. 150, 9 S. Ct. 699, and Re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 S. Ct. 703. But when appeal is sufficient remedy, see Craig v. Hecht, 263 U. S. 255, 68 L. ed. 293, 44 S. Ct. 103, and Judge Learned Hand's dissenting opinion in the Craig case (C. C. A. 2d) 282 F. 138, 155.

"Perhaps it is well that a writ the historic purpose of which is to furnish 'a swift and imperative remedy in all cases of illegal restraint,' see Lord Birkenhead, Ld. Ch., Secretary of State v. O'Brien [1923] A. C. (Eng.) 603, 609—H. L., should be left fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines. But if we are to leave the law pertaining to habeas corpus in the unsystematized condition in which we find it, then I believe it is true of both cases what Judge Learned Hand said of the Kulick Case, that the writ is necessary 'to prevent a complete miscarriage of justice.' 157 F. 2d 811, 813. If

the justification need be no more definite than the existence of 'exceptional circumstances,' Bowen v. Johnston, 306 U. S. 19, 27, 83 L. ed. 455, 461, 59 S. Ct. 442, the reasons for allowing the writs in these cases are more compelling than were those in Bowen v. Johnston, where there merely appeared 'to be uncertainty and confusion . . . whether offenses within the . . . National Park are triable in the state or federal courts.' For the reasons set forth in Judge Hand's opinion, it 'would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal.' 157 F. 2d at 813."

I, T. Emmett McKenzie, counsel for petitioner, do hereby certify that this petition is not filed for purposes of delay, and is filed in good faith.

After careful consideration I am entirely unable to clearly understand why the original petition was not granted, under the Court's ruling in *Sunal v. Large*, *supra*.

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